FILED BY CLERK
SEP 17 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CHRISTINA MARIE GEORGE, Petitioner.	2 CA-CR 2008-0072-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021134

Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Law Office of Douglas W. Taylor
By Douglas W. Taylor
Tucson
Attorney for Petitioner

P E L A N D E R, Chief Judge.

¶1 Following a jury trial, Christina Marie George was convicted of fleeing from a law enforcement vehicle, aggravated assault with a deadly weapon, criminal damage of property, and theft of a means of transportation. The jury was unable to reach a verdict on an additional charge of aggravated assault, and the court declared a mistrial as to that count. The trial court sentenced George to presumptive terms of imprisonment ranging from five to 11.25 years, to be served concurrently with each other but consecutively to the sentences imposed in an earlier case. This court affirmed her convictions and prison sentences on appeal but vacated the trial court's imposition of consecutive community supervision and remanded for resentencing on that matter only. *State v. George*, No. 2 CA-CR 2002-0375 (memorandum decision filed Sept. 24, 2004). In this petition for review, George challenges the trial court's denial of her petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We review the court's ruling for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Although we grant review, we deny relief.

¶2 In her petition below, George claimed several actions and omissions by trial counsel constituted ineffective assistance of counsel. She alleged: (1) counsel had failed to request a hearing to address her request for new counsel; (2) counsel had failed to object to the jury instructions on count three of the indictment, aggravated assault with a deadly weapon or dangerous instrument, or request a clarifying jury instruction regarding the applicability of its simple assault instruction to that charge; (3) counsel effectively conceded

guilt on four of the five counts in the indictment during closing argument; and (4) counsel failed to make an offer of proof regarding evidence excluded pursuant to the state's motion in limine regarding police and/or sheriff's department pursuit policies. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* ¶ 21. A strong presumption exists that counsel provided effective assistance, *State v. Valdez*, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991), and a defendant has the burden of overcoming that presumption, *see State v. Chee*, 140 Ariz. 171, 173, 680 P.2d 1232, 1234 (App. 1984).

¶3 Preliminarily, we note that George's first argument is, in essence, a claim of trial error that she failed to raise on direct appeal. She relies on *State v. Torres*, 208 Ariz. 340, ¶ 9, 93 P.3d 1056, 1059 (2004), a direct-appeal case, in which our supreme court found "the trial judge [had] abused his discretion by not conducting an inquiry into Torres's request for substitution of counsel." But Rule 32.2(a)(1) precludes relief on any ground "[r]aisable on direct appeal," and George has not asserted a claim of ineffective assistance of appellate counsel. To the extent she contends that the court would have granted her request for new counsel had her trial counsel requested a hearing on the issue, nothing in the record supports that contention.

¶4 In her petition for review, George acknowledges the trial court's denial of relief was "[c]hiefly" based on its conclusion that, because the evidence against her had been overwhelming, she had failed to show a reasonable probability of prejudice from counsel's alleged deficiencies. She does not, however, expressly address the issue of prejudice in her arguments to this court, nor does she address the court's determination that the evidence against her had been overwhelming. Thus, we are not persuaded that the trial court abused its discretion in denying relief.

¶5 To the extent she contends that prejudice should be presumed in relation to her claim that counsel effectively conceded her guilt in closing argument, we disagree. In *United States v. Cronic*, 466 U.S. 648, 659 (1984), the Supreme Court held: "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." But that did not happen here. As George concedes, "[a] concession of guilt during closing argument may, in some circumstances, be viewed as a sound technical strategy" to focus or enhance credibility on counts that are defensible, thus barring a presumption of prejudice. *See United States v. Thomas*, 417 F.3d 1053, 1058 (9th Cir. 2005); *United States v. Swanson*, 943 F.2d 1070, 1075-76 (9th Cir. 1991). The record in this case supports the trial court's implicit determination that counsel's argument was strategically reasonable given the overwhelming evidence on the applicable counts and did not constitute a failure to subject George's case to meaningful adversarial testing.

¶6 In its minute entry denying George's petition for post-conviction relief, the trial court correctly identified and applied the legal standard for determining prejudice. The court described the trial evidence and thoroughly explained its determination that the evidence was "so overwhelming that even the most competent defense attorney would be unlikely to obtain a different result." Because that ruling is supported by the record and the law, we see no purpose in rehashing that ruling here; thus, we adopt it and deny relief. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.3d 1358, 1360 (App. 1993).

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge